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Digital Platform Regulatory Challenges – Is History Repeating Itself?

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Data first travelled utilising packet switching technology in 1969, between four university network nodes in the United States (US) – in the same year that the International Institute of Communications (IIC) was founded. In 1971, the US regulator, the Federal Communications Commission (FCC), published findings in the form of the Computer Inquiry I.¹ The aim of this investigation was to promote economic growth and innovation in the computing services market. It established a division between regulated ‘pure’ communication services – using computers to run communication networks – and unregulated ‘pure data processing’ services using computer power at the edges of these networks. The monopoly provider of communication services in the US at the time was AT&T, and it was thereby prohibited from directly offering unregulated data processing services. Bernie Strassburg, then Chief of the FCC Common Carrier Bureau, had justified the exclusion of data processing from traditional communication service regulation in this way:

‘Few products of modern technology have as much potential for social, economic, and cultural benefit as does the multiple access computer. With its huge capacity and versatility and in combination with communications – also in the forefront of the technological revolution – the computer is a storehouse of virtually untapped new and improved services to the public.’²

Substitute artificial intelligence or algorithm for ‘multiple access computer’ in this quotation and the reason often given for maintaining unregulated digital platform companies is similar today – regulation will suppress innovation and is not healthy for the economy. By 1980, the aim was to ensure that any regulatory regime would not hamper the market conditions that were expected to foster ‘information systems [that] can be programmed so that *users dictate* the nature and extent of computer processing applications’.³ In these early days of computerised services, much hope was placed in a market evolution in which ‘users’ – consumers or citizens – would have control of their digital environment.

We interact with digital technologies and services today that differ in kind and degree from their predecessors, but the challenges for regulators are in some ways not substantially changed. Modern digital platforms are distinguished by their use of digital technologies for binding, coordinating, and implementing methods for linking multiple suppliers and consumers or citizens using their data. The dominant market positions achieved by Google, Facebook, Amazon and Twitter are echoed by those

of Tencent, Alibaba, Baidu or Weibo in the Chinese market. Their market dominance is widely attributed to the ‘intelligent’ capabilities of machines; market entry by companies that disrupts older ‘single sided’ business models; and the scale of globally distributed end-users of platforms. The digital platforms enable “datafication” (information circulation and commodification) which constitutes the key element of platformisation.⁴ The dominant platform companies often claim they are not providing traditional communications services (and are not publishers) and, thus, they should not be subject to communications, media or other forms of regulatory oversight.

The FCC’s Computer Inquiry I decision was an instance of a regulator aiming to stimulate economic growth and innovation in new digital services, *and* to protect the public interest in traditional (voice) communication services. The European Commission’s Specialized Group on Telecommunications in 1969 already was grappling with the risk that developments in the United States would leave Europe behind in the face of the ‘the almost explosive nature of demand for all modes of transmission of information especially in the field of telephony’.⁵ Decisions made at this time sparked controversies about what services should be regulated, and now haunt those seeking to govern what has become a hugely complex digital ecology. These controversies have yielded different responses in Europe, and in other countries and regions, and today, governments in the West are asking what should be done when the erosion of boundaries between industries providing communication transport, content, and data processing means that the issue of which services should be regulated is once again prominent and strongly contested.

In the 1960s, those committed to safeguarding data-related services from regulation argued that the monopoly position of the then traditional communication service providers was not “natural” and that their economies of scale were not the most important factor in determining the shape of future communication, media and information processing markets. Decisions then, and later, reflected turf wars; competing claims to ownership of knowledge underpinning technical innovations; changing distributions of economic (and political) power; and shifting perceptions of the need to protect consumer and citizen interests. A characteristic of decisions about how and what to regulate over time has been the argument that technically induced “natural” monopoly is not sustainable in the face of rapid technological innovation, and that monopoly power will ebb away if left to market forces. Yet, it has also been argued that the existence of monopoly conditions at a given time does not ‘preclude direct, effective competition in an area. They in no way require an enormous concentration of ownership and accumulation of monopoly power’.⁶ Dominant incumbent companies – then the public telecommunication operators and now the largest digital platforms – will do their best to slow the pace of new entry to protect their markets. Reducing barriers to entry

has provided a rationale for regulatory intervention with the expectation that variety in service characteristics and modes of operation will emerge as a result of competition. In the current period, the lesson is that the dominance of the large digital platform companies is not determined by the nature of their technologies or by market dynamics alone. The presence or absence of effective competition is also, and crucially, the outcome of decisions about whether and what to regulate to secure the public interest.

Fifty years ago it was not only traditional communication and computing services that were considered in deliberations about what to regulate. Non-economic values and outcomes were also high on the agenda, especially regarding media content. In 1970 the Council of Europe issued its Declaration on Mass Communication Media and Human Rights, establishing that the 'right to freedom of expression shall apply to mass communication media' and confirming a right to privacy: 'Where regional, national or international computer-data banks are instituted the individual must not become completely exposed and transparent by the accumulation of information referring even to his private life' (Art. 19).⁷ These expectations continue to be central in deliberations about how and what to regulate in western societies.

The history of the spread of the internet and media, communication and computing industry convergence from this early period to the present has spawned a proliferation of over-the-top digital services and seen the meteoric rise of a small number of dominant platform companies. The interests of governments and civil society stakeholders in the digital platform ecology are increasingly regarded as misaligned with the platforms' business models and ambitions for growth. Discussion is focusing on behavioural and structural market remedies that can be achieved through regulation. What has changed is that the platform companies are continuously seeking to strengthen and diversify their revenue streams by exploiting global, as well as regional and national, markets. In the international system that facilitates trading relationships, they can organise their operations with relatively little regard for national boundaries, although they encounter specific national constraints in China and, increasingly, in Western national jurisdictions. In the face of threats of regulation, their strategy is to use public relations communications and the courts to deflect criticism. In this regard, arguably little has changed from earlier struggles over what and how to regulate. When confronted with proposed or implemented changes in laws aimed at curtailing platform practices, today's companies highlight their commitments to public values – 'Google cares deeply about journalism'⁸ – not unlike AT&T's slogan used in the early 1980s, when it was confronted by the threat of a break-up of its monopoly in the communications market: 'reach out and touch someone (to share good news)'.⁹

Voluntary codes of practice and ethical codes are being developed by the platforms in response to calls for public action and threats (and sometimes new forms) of regulation. But the burden of proof rests on those who are concerned about the power of platforms to demonstrate that platform self-regulation is not yielding societal well-being and solidarity. The argument is that, while there is a need to stimulate innovation, foster connectivity, build trust, and increase transparency and accountability, this should be principally the responsibility of the digital platform companies so as not to risk slowing the pace of innovation. Even when the potential for exclusion, inequality and harms to democracy or young people are acknowledged, the solution is often said to lie in the further development of “smart” technical innovations.

When pro-active responses to digital platform dominance are considered, the question is whether new institutional rules and norms for regulation can be devised to yield the outcomes valued by society.¹⁰ What criteria should be used to determine whether a new governance set-up should be put in place? Regulation by the state, co-regulation by platforms and the state, and various forms of independent regulation provide multiple options, but each raises questions about how to ensure that clashes among economic and public values do not yield outcomes that are disadvantageous or harmful to specific individuals or groups of stakeholders.

The largest digital platforms no longer operate as a nascent industry and the way digital information collection and processing technologies are being used has beneficial, but also harmful, implications for society. Throughout history, the resolution of regulatory and accountability issues has been central in determining the scope of regulatory intervention in the marketplace. The aim has been to ensure that providers of electronic services can pursue their economic goals, while also safeguarding public values such as freedom of expression and privacy. The balance among these values has always been contested – as Kant put it, ‘in the kingdom of ends, everything has either a price, or a dignity’.¹¹ The platforms’ digital ecologies embrace all these values and it is unsurprising that there is turmoil and contestation. Questions about the moral limits of the market in the platform era are essentially about what is needed by way of oversight to strike a balance between the interests of large and small players in the market and consumers and citizens.

In the face of criticism of the dominant platforms, there is much discussion about whether and how to impose a legal information fiduciary obligation¹² on them, or a duty of care.¹³ In the UK, a Parliamentary Committee has concluded that ‘self-regulation by online platforms which host user-generated content, including social media platforms, is failing’.¹⁴ The dilemma is how to ensure that governments do not use the recognition of harms as a justification to give themselves control that infringes on people’s rights and freedoms. The desire to intervene in the digital platform market is

producing tough language and the political will is accumulating to redirect the platforms' business strategies. For instance, a British House of Commons report on disinformation says that 'companies like Facebook should not be allowed to behave like "digital gangsters" in the online world, considering themselves to be ahead of and beyond the law'.¹⁵ Behavioural remedies aiming to encourage proactive agency on the part of digital platform users include requiring data mobility and interoperability standards between platforms; investing in strengthening media and data literacies; oversight of platform terms of service; insisting on algorithm transparency; recognition of user rights of data ownership and, in some cases, making platform executives legally liable for harmful content. Structural remedies are also being considered as the dominant platforms in the Western world come to be regarded as the robber barons of the 21st century; an "evil" that has created a 'road to digital serfdom'.¹⁶ While acknowledging that the domination of the major digital platforms is not guaranteed to last forever, the 2019 UK Digital Competition Expert Panel report also says that 'competition for the market cannot be counted on, by itself, to solve the problems associated with market tipping and "winner-takes-most"'.¹⁷

Regulatory remedies for platform power arising from "winner-takes-most" market dynamics cannot, however, tell us specifically where accountability should rest for protecting freedom of expression and privacy. Yet, while multiple initiatives are being discussed to protect citizens from the power of the dominant platforms, for the most part, the priority in Western countries continues to be promoting economic growth and technology innovation. There is still a strong tendency to accept that today's monopolistic, dominant digital platforms are the inevitable outcome of a particular configuration of modular technologies. This means that the preservation of social values and human dignity in the face of platform power (and biased algorithms) is often downplayed in favour of a competitive race towards investment in innovative technologies, including artificial intelligence and machine learning. What can be priced, quantified and calculated in the marketplace is too often being privileged over social values, even as policy makers struggle with the question of what and how to regulate.

In the face of what many see as an information crisis, where individuals are seen as vulnerable to misinformation, easily nudged and manipulated, and lacking in critical media literacy,¹⁸ the digital platform operators continue to be encouraged to develop what amounts to a pervasive culture of surveillance that is inconsistent with public values of fairness, solidarity, accountability and democracy.¹⁹ When there are calls – as in the British Government's Online Harms White Paper – for a new regulatory institution to curtail platform power, proposals emphasise a proportionate approach, with action rightly requiring evidence of the severity of harms and assessments of the

expected impacts on the platforms' behaviour. Even if there are some successes in securing the independence of any new regulatory institution, and in achieving greater transparency of the dominant platforms' operations,²⁰ most proposals still seem intent on fostering a platform logic of intense datafication. They do not, so far, make inroads in tackling the underlying logic of datafication; a logic based on subliminal influence and attitude change on a mass, but highly individualized, scale. If this logic is to be tackled, it will require a regulatory regime that works as a counterpoint to these datafication practices. It will require open debate about the moral limits of digital platform markets which challenges the idea that the configuration of digital platforms and their business models are "natural".

If changes are implemented and enforced through a regulatory framework, this will influence investment in the digital infrastructure and the platforms' business strategies. The struggle today, as in the past, is over how to stimulate competition and, at the same time, assure citizen safety, security, privacy and freedom of expression. As in earlier eras, the information and communication environment favoured by the dominant companies has the potential to be both empowering and disempowering. Today's digital technological system is shaping how we work, shop, learn and play and it is enabling how we build, organise, co-ordinate, and deliberate upon our futures – every citizen has a stake in the future that is being constructed. The digital platforms' decisions can reinforce or construct new systems of hierarchical control and divisions of labour that enrich the choices and material welfare of a few at the expense of others, or their digital systems can be developed consistent with the values of equity and justice embodied in rights to privacy and freedom of expression and responsibilities to protect them. The form that the digital ecology takes in the future will be shaped by governance arrangements – public and private – as it has been in the past.

Whatever the choices made to give new mandates to regulatory institutions, it is essential to be able to evaluate whether the claims made by the dominant platform companies are empty promises or crude approximations of more profound transformations that lie ahead. Establishing and enforcing an accountability framework is the most important step toward refining and innovating in the processes of governing these platforms. When we do not know specifically how the digital ecology is failing to meet society's aspirations, we are ill-prepared to enhance its benefits; re-direct it from misguided paths; or mitigate its negative consequences. Good governance involves the recognition of rights and the acceptance of responsibilities; and controversy will persist about whether developments in digital platform technologies and services should be mainly market-led or if they should be subject to regulation. Controversy will also persist about whether the explosion in the

quantity of digital information, and in the capacity to communicate across time and space, are producing a more knowledgeable, equitable and desirable society.

As the boundaries between technologies and industry segments change, the potential for the exercise of harmful market power will continue to change. Fifty years on from today, there will still be a responsibility for representing the public interest in a healthy economy, and in safeguarding citizen's fundamental rights. The myth is that the digital platform companies have been virtually unregulated or self-regulated. Yet, although traditional forms of communications and media regulation have not applied (as a matter of choice), the platforms are subject to a considerable number of legislative conditions – with regard to commerce, data protection and more. These have governed or “regulated” their performance to date. The issue, then, is not whether the digital platforms should be regulated, it is how institutional arrangements can be altered to better reflect societal norms and values so that new conditions shape the platforms' priorities and business practices.

Looking forward, interests in enhancing security and safety to guard against platforms' and users' activities that are illegal or disapproved of will continue to struggle against interests defending the fundamental right to be free from surveillance and the right to freedom-of-expression. There will be a need for codes of conduct with respect to individual and collective issues, and for standards appropriate to locally, nationally, regionally and globally bounded environments. There also will be a continuing need for competition policy in the wake of consolidating market power and for overcoming coordination problems in monitoring digital platform operations, as there was in the past.

In these respects, history could be said to be repeating itself. Yet, there is a difference. This difference is that today there are many signs, not all well-founded in evidence, that the *combination* of changes in the digital world, and in the everyday off-line world, are destabilising what have come to be more-or-less taken for granted norms concerning how human beings get on together; how social relations are constituted; and how trust and respect for others are fostered in Western societies. In this sense, history is not repeating itself and decision makers sit at a new critical juncture. We may look back from the future and see that regulatory inaction, or ineffective regulation, has helped to foster incivility, inequality, and dissension in our societies. This will happen if decisions to encourage participation in a digital ecology are led predominantly by a collective fascination with the potentialities of data and data-processing technology. If, in contrast, such decisions are led by the norms and controls consistent with information systems that sustain human beings, and their dignity, there may be a chance to sustain an inclusive and beneficial social order.

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